STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 26, 2004
v	No. 246940 Wayne Circuit Court
DEREK ANDREW JOHNSON, Defendant-Appellant.	LC No. 02-009045

Before: Whitbeck, C.J., and Owens and Schuette, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of three counts of assault with intent to commit murder, MCL 750.83, and one count each of being a felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b, arising from the shootings of three victims, Cheryl Fields, Velvet Ochel, and Milton Payne. He was sentenced to three concurrent terms of fifty to seventy-five years' imprisonment for the assault convictions, a concurrent term of two to five years' imprisonment for the felon in possession conviction, and a consecutive term of two years' imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

I. FACTS

This shooting arose from a dispute between defendant and Ochel over payment for a lawn mower. Payne testified that he accompanied Ochel during her purchase of the lawn mower from defendant, whom Payne also identified in court as "Polo," and whom Payne generally encountered on the streets of Inkster at least once each day.[1] Ochel initially gave defendant $40 worth of crack cocaine as a partial payment for the mower, for which she then owed $10 or $20, and took possession of it. The next day, Ochel paid her debt to defendant, who seemed angry and swore at her. He threatened to kill her and Ochel offered defendant some unkind words in

[1] Payne estimated that defendant had visited his house on Harriet Street two or three times before the time of the lawn mower transaction, and that defendant had smoked crack there. (Tr IV, 107-108, 129, 157-158). Fields never saw defendant at any of the parties she attended at Payne's house. (Tr II, 109).

return. Within the next fifteen to twenty minutes, defendant approached Ochel and suggested "no hard feelings," after which the lawn mower dispute appeared to have passed. Ochel did not see defendant again until the time of the shooting.

A few weeks later, Ochel, Fields and Payne were driving back from a gas station. Around 1:30 a.m., Ochel drove the victims back toward Payne's house, and as they reached Harriet Street, Fields noticed an African-American male wearing dark clothing jogging toward the back of Payne's house. Ochel backed the Grand Am, which contained Payne in the front passenger seat and Fields in the back seat, into Payne's driveway. Just as Ochel had completely backed the Grand Am into the driveway, placed her foot on the brake and shifted the transmission into park, Fields saw defendant "dart from behind [Payne's] house."

Ochel testified with certainty that after she had backed the Grand Am into Payne's driveway, she turned to her right toward the car's rear passenger side and saw defendant, who wore a dark coat, standing "right there with a gun and it was over." Defendant immediately began shooting. Ochel sustained five gunshots in her legs, one through her arm or elbow, and one that struck her bowels. Fields sustained one gunshot wound to the neck and her pregnancy ended in a miscarriage. Payne sustained a gunshot wound to his lower right abdomen that impacted his diaphragm and liver.

The victims managed to pull out of the driveway and drive a few blocks away. Ochel then passed out and drove the car onto a curb. Bypassers called the police and when police arrived, all three victims identified defendant as their assailant.

II. JURY OATH

Defendant first contends that the circuit court clerk's utilization of a defective oath to swear the jury violated his right to a fair and impartial jury. We disagree.

A. Standard of Review

Defendant did not preserve this issue with an appropriate objection at trial; therefore, we will consider it only for plain error that affected his substantial rights.[2] *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

[2] Defendant offers no authority in support of the notion that the administration of a defective oath to the jury qualifies as a structural constitutional error. *People v Green*, 260 Mich App 392, 415; 677 NW2d 363 (2004) (explaining that this Court deems abandoned allegations of error unsupported by relevant authority). Furthermore, the defective oath does not amount to a structural error, which deprives a defendant "of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *People v Duncan*, 462 Mich 47, 52; 610 NW2d 551 (2000).

B. Analysis

Defendant maintains that the oath administered to the jury in this case omitted prescribed language pursuant to which the jury should have sworn to decide the case on the basis of the evidence presented at trial. In Michigan, the following court rule and statutory provisions govern the swearing of a jury:

> The jury must be sworn by the clerk *substantially* as follows:
>
> "Each of you do solemnly swear (or affirm) that, in this action now before the court, you will justly decide the questions submitted to you, that, unless you are discharged by the court from further deliberation, you will render a true verdict, and that you will render your verdict only *on the evidence introduced* and in accordance with the instructions of the court, so help you God." [MCR 2.511(G) (emphasis added).]
>
> The following oath shall be administered to the jurors for the trial of all criminal cases: "You shall well and truly try, and true deliverance make, between the people of this state and the prisoner at bar, whom you shall have in charge, according to *the evidence* and the laws of this state; so help you God." [MCL 768.14 (emphasis added).]

In this case, the oath read to the jury, which was nearly identical to the statutory model, neglected to include the emphasized reference to "the evidence" as a basis for the jury's decision.

The circuit court explained to the jury at length during its initial instructions that it had the obligation to decide the facts of the case on the basis of the evidence produced at trial, that it could consider evidence consisting of sworn witness testimony, physical objects and stipulations by the parties, and that it could not consider as evidence the statements of the court and attorneys, and the objections and questions of counsel. The court further advised the jury during the initial instructions that it should "listen closely to the evidence so that at the close of the trial you will be in a position to make a fair, informed decision regarding your verdict," then again emphasized that "it's very important that you listen closely to the evidence that is presented to you during the course of the trial." Just before concluding the initial instructions, the court reiterated that "it is vitally important that you hear and understand the evidence in this case so that you can make a fair decision."

Near the commencement of the final instructions that followed the parties' arguments, the court reminded the jury, "Remember that you've taken an oath to return a true and just verdict based only on the evidence and my instructions on the law." The court then repeated that the jury had exclusive authority to determine the facts of the case and cautioned the jurors that "[w]hen you discuss the case and decide on your verdict you may only consider the evidence that has been properly admitted in this case." The court also repeated its earlier clarification of what constitutes evidence and again explained the different types of evidence.

The circuit court obtained the jury's affirmation at the commencement of trial that it would truly try defendant according to the law. The court subsequently and repeatedly emphasized to the jury its legal obligation to render its verdict solely on the basis of the evidence

presented during trial and the court's instructions. As a result, it is apparent that the jury had acute awareness of its obligation to fairly and impartially decide defendant's culpability. *People v Pribble*, 72 Mich App 219, 224; 249 NW2d 363 (1976) (explaining that the oath is designed to protect the fundamental right of trial by an impartial jury). Taken together, the oath administered and the repeated instructions impressed on the jurors the importance that they "'pay attention to the evidence, observe the credibility and demeanor of the witnesses and conduct themselves at all times as befits one holding such an important position." *People v Clemons*, 177 Mich App 523, 529; 442 NW2d 717 (1989), quoting *Pribble*, *supra* at 224. Under these circumstances, we cannot conclude that the court clerk's minor deviation from the court rule or statutory oath form affected the outcome of defendant's trial. *Carines*, *supra* at 763.

III. PROSECUTORIAL MISCONDUCT

Defendant next raises thirty-one alleged instances of prosecutorial misconduct, together with two related alleged evidentiary errors by the circuit court.

A. Standard of Review

Defendant preserved for appeal only three of his allegations by raising objections at trial to the prosecutor's argument and introduction of evidence. This Court reviews properly preserved claims of prosecutorial misconduct according to the following standards:

> Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. [*People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).]

This Court reviews alleged instances of prosecutorial misconduct in context to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Appellate review of improper remarks by the prosecutor is generally precluded absent an objection by defense counsel because a failure to object deprives the trial court of an opportunity to cure the alleged error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). This Court reviews unpreserved claims of prosecutorial misconduct only for plain error that affected the defendant's substantial rights. *Schutte*, *supra* at 720. No error requiring reversal exists if a timely instruction could have cured the prejudicial effect of the prosecutor's remarks. *Id.* at 721.

B. Analysis

We conclude that the arguments and introduction of evidence by the prosecutor, taken as a whole and analyzed in the context of the arguments made by the defense counsel did not abridge defendant's right to a fair trial or impair his substantial rights. No error occurred in the course of the prosecutor's jury voir dire, during which the prosecutor properly posed inquiries to

ascertain that the potential jurors could fairly and impartially try the instant case. *People v Sawyer*, 215 Mich App 183, 186-187; 545 NW2d 6 (1996). Similarly, no error occurred during the prosecutor's opening statement, in which the prosecutor accurately described the facts that he expected the evidence to show, *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991); the prosecutor did not improperly vouch for the credibility of Fields and Ochel by suggesting during his opening statement that he had some special knowledge concerning the truth of their testimony, and did not urge the jury to convict defendant as part of its civic duty. *People v Bahoda*, 448 Mich 261, 276, 282; 531 NW2d 659 (1995). The challenged portions of the prosecutor's closing and rebuttal arguments reflect that the prosecutor appropriately made various arguments on the basis of the evidence presented during trial and the reasonable inferences arising therefrom, including that Fields and Ochel were worthy of belief, and that the prosecutor also accurately described the relevant law. *Schutte*, *supra* at 721; *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). The prosecutor did not suggest during closing argument that he had special knowledge concerning the veracity of Fields and Ochel and did not personally attack defense counsel. *Bahoda*, *supra* at 276; *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). Furthermore, the prosecutor properly introduced relevant evidence of Fields' miscarriage,[3] the ammunition box top, and alibi witness Connie Gray's potential bias to testify favorably to defendant because he sometimes purchased drugs for her, none of which evidence occasioned any unfair prejudice that substantially outweighed its probative value. MRE 401; MRE 403. The prosecutor also properly elicited Fields' testimony that, hours before the shooting, she saw defendant in possession of a semiautomatic weapon similar to that likely used in the shooting, which testimony constituted direct evidence of defendant's guilt not subject to MRE 404(b) analysis. *People v Hall*, 433 Mich 573, 580-584; 447 NW2d 580 (1989).

Our review of the record is further drawn to five specific instances of prosecutorial misconduct alleged by defendant, only one of which was objected to on the record.

1. Closing Argument

One of the few alleged instances of misconduct to which defendant objected at trial centers on the prosecutor's closing argument reiteration of trial testimony by Inkster Police Detective Anthony Abdallah, during which Abdallah justified his decision to request a SWAT team to effectuate defendant's arrest. During closing argument, the prosecutor mentioned,

[3] Even in the absence of any expert testimony that conclusively linked defendant's shooting of Fields with her miscarriage shortly after the shooting, the jury reasonably could infer that defendant's conduct caused Fields to miscarry. The extent of Fields' injuries had relevance to defendant's intent to murder her, a material fact in this case. MRE 401. In light of Fields' doctor's testimony that she could not link with certainty Fields' miscarriage and the shooting, the miscarriage was not highly probative of the extent of Fields' injuries. But because defendant entirely fails to set forth with any specificity that the miscarriage evidence caused him unfair prejudice, we cannot conclude that any unfair prejudice substantially outweighed the probative value of the miscarriage evidence. MRE 403. Therefore, the circuit court did not abuse its discretion in admitting the miscarriage testimony. *People v Bulmer*, 256 Mich App 33, 34; 662 NW2d 117 (2003).

before being interrupted by a sustained defense objection, that "[t]his defendant is so dangerous and *his background* . . . ." (Emphasis added). The prosecutor accurately summarized Abdallah's explanation that he requested the SWAT team because of "the seriousness of the crime and [his] feeling of how dangerous [defendant] was." On cross-examination by defense counsel, Abdallah added that he had reviewed defendant's background. While the prosecutor approached the potentially improper topic of defendant's criminal background, he disclosed no details concerning that background for the jury's consideration. The brief, general, and isolated mention of defendant's background did not deprive him of a fair trial.

2. Prosecutor's Rebuttal Argument

In his rebuttal argument, the prosecutor discussed his knowledge of octopi, then equated the defense with an octopi defense mechanism: "Understand, defendant's presentation to you is like an ink screen. You can pass through it. It has no substance. It is an attempt to change your focus. Don't be changed." The prosecutor's exhortation to the jury not to fall prey to defense counsel's effort to "try the witness[es]" instead of defendant occurred in rebuttal to defense counsel's primary effort during his closing argument to discredit Fields' and Ochel's identifications of defendant, including by arguing that (1) Fields could not have seen the shooter because she was facing forward in the car when she was shot; (2) Fields' alleged positioning of defendant behind Payne's house did not match with the location of the shell casings; (3) darkness surrounded Payne's driveway; (4) Fields and Ochel had a history of drug use; (5) at the time of the shooting, all of the victims were intoxicated and either smoking or preparing to smoke more crack; (6) Fields was fatigued at the time of the shooting; (7) crack smoke filled Ochel's car; (8) the car's windows were up and its interior lights blocked any view of the darkness outside; and (9) the shooting happened very fast and sent the victims into states of shock. In light of defense counsel's arguments, the prosecutor reasonably responded by urging the jury not to lose its "focus on trying . . . defendant," not the witnesses. *Watson*, *supra* at 593. "Reversal is not required, especially in light of defendant's failure to object." *Id*.

3. MRE 404(b)

Fields testified that she knew defendant sold drugs from the driveway of an Ash Street residence, and that on one occasion two to three weeks before the shooting, she had approached defendant there to inquire about purchasing some cocaine, which she ultimately decided not to buy. Defendant raised no objection to Fields' testimony on the basis of MRE 404(b). The prosecutor's questioning of Fields regarding defendant's drug dealing on Ash Street within weeks of the shooting occurred within the context of eliciting the extent of Fields' familiarity with defendant, which was highly relevant to her ability to identify defendant as the shooter, the centrally disputed issue at trial. MRE 401. The evidence of Fields' contacts with defendant shortly before the shooting made more likely the certainty of her identification of defendant as the shooter, a material fact in dispute. MRE 401. While the evidence of Fields' familiarity with defendant conceivably carried some inherent potential that defendant had bad character because of his drug dealing, we do not detect that the evidence injected into the trial any unfair prejudice that outweighed the significant probative value of the evidence, MRE 403, especially in light of the facts that (1) Payne offered testimony at trial, to which defendant also failed to object, concerning defendant's involvement in drugs; (2) defendant's own statement, as recounted by Abdallah, indicated that Ochel owed him $20 for crack; and (3) defense counsel and the prosecutor questioned the victims extensively regarding their drug use habits in the Inkster

neighborhood where the shooting occurred, where crack houses existed, and where the victims and defendant encountered and had become familiar with each other. Because the evidence had high probative value toward establishing the credibility of Fields' identification of defendant and showed merely that defendant, like nearly all the civilian witnesses who testified in this case, had some involvement with drugs, to the extent the prosecutor violated MRE 404(b) by failing to give defendant proper notice and injecting defendant's drug dealing at trial, a curative instruction to the jury could have negated any potential for unfair prejudice. Consequently, this unpreserved issue does not warrant appellate relief.[4] *Schutte, supra* at 721.

4. Weapon Possession Testimony

Defendant also suggests that the prosecutor improperly introduced Payne's testimony that although defendant did not commonly possess a weapon, within two to three weeks before the shooting, Payne saw defendant in possession of a silver gun on two occasions. Defendant did not object at trial to the substance of the prosecutor's questions on the basis of MRE 404(b). Even assuming that the prosecutor's questions elicited evidence in violation of MRE 404(b), we cannot conclude that any plain error affected the outcome of defendant's case in light of the general nature of the gun possession evidence, which did not suggest defendant's participation in criminal conduct with the gun, the fact that a curative instruction could have eliminated any potential prejudice, and the otherwise substantial evidence of defendant's guilt, including Fields' and Ochel's expressions of certainty regarding their identifications of defendant as the shooter, and defendant's possession at the time of his arrest of an ammunition box top labeled with the same manufacturer, caliber and "Luger" denomination as several shell casings that the police recovered at the scene of the shooting.

5. Untruthful Testimony

Defendant further maintains that the prosecutor improperly elicited Payne's testimony that prosecution witnesses had testified untruthfully. During the prosecutor's direct examination of Payne, he inquired whether several police officers had made a mistake or lied in their previous testimony that Payne had identified defendant as his assailant immediately after the shooting. This Court has long recognized that "a witness may not give the jury an opinion as to the credibility of another witness" because the credibility of a witness remains "solely within the province of the jury." *People v Adams*, 122 Mich App 759, 767; 333 NW2d 538 (1983), rev'd on other grounds 421 Mich 865 (1985). Although the prosecutor asked Payne an inquiry of questionable propriety about the veracity of the police officer witnesses, defendant failed to object to the inquiry, which therefore is subject to plain error analysis. *People v Knapp*, 244 Mich App 361, 384-385; 624 NW2d 227 (2001); *Adams, supra* at 767. In light of the fact that the prosecutor asked only one isolated question of Payne regarding his belief in the veracity of the police officers, and the fact that a timely objection and curative instruction could have

[4] With respect to defendant's related claim that the circuit court abused its discretion by admitting Fields' testimony concerning his drug dealing on Ash Street, we similarly conclude that because the evidence had probative value that was not substantially outweighed by any danger of unfair prejudice, any alleged violation of MRE 404(b) did not affect the outcome of defendant's trial. *Carines, supra* at 763.

eliminated any possible prejudice, we conclude that this allegation of misconduct does not warrant reversal. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003); *Knapp*, *supra* at 385.

IV. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant next raises several allegations that his trial counsel provided him ineffective assistance.

A. Standard of Review

Defendant failed to timely file a motion for a new trial or evidentiary hearing to address his allegations of ineffective assistance of counsel, appellate review is limited to mistakes apparent from the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different and that the attendant proceedings were fundamentally unfair and unreliable. *Id*. at 312, 326-327; *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The defendant must overcome the strong presumptions that his counsel rendered effective assistance and that his counsel's actions represented sound trial strategy. *Id*. at 714-715.

B. Analysis

1. Alibi Defense

Contrary to defendant's first contention of ineffective assistance, defense counsel did present an alibi defense through the testimony of Connie Gray, specifically that she and defendant spent time together in Inkster between 11:30 p.m. on June 17, 2002, and 1:00 a.m. on June 18, 2002, then together went to the Romulus home of Linda Neal by 1:50 a.m., where they remained throughout the next day. Defense counsel also presented the testimony of Neal. Although Neal could not recall precisely at what time defendant and Gray arrived at her Romulus residence, Neal's testimony corroborated that they arrived sometime during the early morning hours of June 18, 2002. We find no deprivation of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996).

2. Objection to Cross Examination

We further reject that defense counsel provided ineffective assistance by failing to object to the prosecutor's cross-examination of Gray. The prosecutor's questions of Gray regarding her relationship with defendant, including their shared drug use and whether defendant purchased Gray's crack for her, had relevance to testing Gray's credibility and illustrating her potential bias

in favor of defendant. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995) modified 450 Mich 1212 (1995). The prosecutor's questioning of Gray concerning her and defendant's drug use on June 17 and 18, 2002, similarly had relevance to testing her ability to recall that she and defendant arrived in Romulus at approximately 2:00 a.m. To the extent the prosecutor questioned Gray about cheating on her boyfriend with defendant, Gray had testified on direct examination by defense counsel that when she began dating defendant, she had to meet him somewhere because she already had a boyfriend. Because the prosecutor properly tested Gray's credibility and inquired regarding topics to which Gray testified on direct examination, defense counsel need not have proffered meritless objections to the prosecutor's proper questions. MRE 611(b); *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

3. Expert Witness

Defendant next avers that trial counsel was ineffective by neglecting to secure and present the testimony of an eyewitness identification expert witness, who presumably could have undermined the victims' identifications of him. Defense counsel's determination whether to present an expert witness "is presumed to be a strategic one for which this Court will not substitute its judgment." *Ackerman*, *supra* at 455. A review of the record reflects that rather than employ an expert witness, defense counsel in an apparent effort to taint or undermine the reliability of Fields' and Ochel's identifications of defendant pursued several lines of questioning during cross-examination, including the following areas: (1) counsel extensively questioned Fields and Ochel regarding their history of habitual crack use and the frequency of their drug use around the time of the shooting and on the day before the shooting; (2) counsel elicited from Fields that shortly before the shooting, she had felt tired because of her drug use; (3) counsel asked many questions of Fields and Ochel concerning their drug use immediately before the shooting occurred; (4) counsel asked Fields many questions regarding her opportunity to see defendant, who wore dark clothes, jogging toward Payne's house in the darkness shortly before the shooting; and (5) counsel made extensive inquiries of Fields and Ochel concerning the circumstances of the shooting, including their brief, split-second opportunities to observe defendant just before the shooting, the location of the shooter's moving figure behind Payne's house and then behind a vegetation-covered fence, the darkness around Payne's house, and their inabilities to recall seeing anything after being shot. We conclude that defense counsel acted reasonably when he extensively cross-examined Fields and Ochel regarding the relevant circumstances surrounding their identifications, and that defendant has not overcome the strong presumption that counsel employed a sound trial strategy to forego "perhaps lengthy expert testimony that [the jury] may have regarded as only stating the obvious: memories and perceptions are sometimes inaccurate." *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999).

4. Hearsay

Defendant next maintains that trial counsel should have lodged hearsay objections to testimony by several police officers and an emergency medical technician (EMT) that recounted the victims' identifications of defendant as their assailant shortly after the shooting. The third-party identification testimony by the officers and EMT qualifies as nonhearsay pursuant to MRE 801(d)(1)(C), which provides that "[a] statement is not hearsay if . . . [t]he declarant testifies at the trial . . . and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving the person." First, the victims, who

were the declarants of the identifications to which the officers and EMT testified, all appeared to offer testimony at defendant's trial. Second, Fields, Ochel and Payne all spent time subject to potential cross-examination concerning their prior identifications of defendant. Defendant did not take this opportunity at trial to raise specific questions regarding the prior identifications by Fields and Ochel. *People v Malone*, 445 Mich 369, 377-378; 518 NW2d 418 (1994) (concluding "that a statement of identification is admissible under MRE 801(d)(1)(C) if a witness is present in court and under oath and is considered subject to cross-examination about his prior position"). Because the testimony by the officers and EMT regarding the victims' prior statements of identification does not constitute hearsay, defense counsel was not ineffective by failing to make a groundless objection to the identification testimony. *Snider*, *supra* at 425.

V. DOUBLE JEOPARDY

Defendant next complains that his convictions of both felony-firearm and felon in possession violate the federal and state Double Jeopardy Clauses. US Const, Am V; Const 1963, art 1, § 15. Defendant's argument lacks merit because, as both this Court and our Supreme Court have recognized, the Michigan Legislature clearly intended to permit a defendant convicted of felon in possession also to properly be convicted of felony-firearm. *People v Calloway*, 469 Mich 448, 449-450; 671 NW2d 733 (2003); *People v Dillard*, 246 Mich App 163, 167-168; 631 NW2d 755 (2001).

VI. CUMULATIVE ERROR

Defendant lastly maintains that the cumulative effect of the errors that occurred during his trial deprived him of a fair trial.

A. Standard of Review

When a defendant sets forth a claim of cumulative error, "[r]eversal is warranted only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial." *People v Werner*, 254 Mich App 528, 544; 659 NW2d 688 (2002). In attempting to ascertain the impact of "cumulative error," an appellate court may consider only actual errors. *People v LeBlanc*, 465 Mich 575, 591 n 12; 640 NW2d 246 (2002). "Cumulative error," "properly understood, actually refers to cumulative unfair *prejudice*, and is properly considered in connection with issues of harmless error. Only the unfair prejudice of several *actual* errors can be aggregated." *Id*. at 592 n 12.

B. Analysis

Upon review of defendant's 31 enumerated allegations of prosecutorial misconduct, we conclude that no allegation, standing alone or aggregated constituted actual error requiring reversal. We hold that defendant's right to a fair trial was not prejudiced. Although these allegations reflect, at times, the imperfection of defendant's trial in some respects, we cannot conclude that the cumulative effect of these allegations affected defendant's right to a fair trial. Most importantly, none of the allegations had any significant impact on the centrally contested trial issue, defendant's identity as the shooter. In light of the properly admitted evidence of (1) Fields' and Ochel's repeated and certain identifications of defendant as the shooter at trial; (2) Fields' and Ochel's testimony regarding defendant's anger with Ochel shortly before the

shooting over her failure to make a full payment for a lawn mower, and defendant's threats to kill or "put two to" Ochel; (3) the testimony of several police officers and EMT's concerning the consistent post-shooting identifications of defendant as the assailant by Fields, Ochel and Payne; and (4) the firearms expert's testimony that the shell casings found in front of Payne's house had the same manufacturer, caliber and "Luger" denomination as those marked on the ammunition box top that the police removed from defendant's front pocket at the time of his arrest, we conclude that none of defendant's allegations seriously prejudiced defendant's right to a fair trial. *Werner*, *supra* at 544.

Affirmed.

/s/ William C. Whitbeck
/s/ Donald S. Owens
/s/ Bill Schuette